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Neutral Physician Mandatory When Requested by Interested Party

The Minnesota Supreme Court recently held that Minn. Stat. § 176.155, subd. 2 (2006), providing for the designation of a neutral physician to examine an injured worker, is mandatory when an interested party makes a timely request for such designation. *Reider v. Anoka-Hennepin School Dist. No. 11*, 728 N.W.2d 246 (Minn. March 8, 2007). In certain situations, such a designation can provide an invaluable tool to resolve hotly contested medical disputes with widely divergent medical opinions.

In *Reider*, the employee sought chiropractic care for pain in her neck, shoulders, arms and upper and mid-back, which she reported was a gradual onset of symptoms associated with her work-related activities as a sign language interpreter. Not surprisingly, the treating physician and the independent medical evaluator came to opposite conclusions on the issue of medical causation.

Following an unsuccessful settlement conference, the employer filed a motion for an examination by a neutral physician pursuant to

Workers' Compensation and No-Fault Bills Never See the Light of Day

The 2007 Minnesota Legislature considered several bills that could substantially alter both the Minnesota Workers' Compensation and No-Fault Acts. While none of these bills were passed during the 2007 legislative session, it is highly likely that the topics will be revisited in the next session as there seems to be a strong contingency of legislators pushing for change in this area. The following is a summary of some of the proposed changes.

MINNESOTA WORKERS' COMPENSATION ACT, CHAPTER 176 SENATE FILE NUMBER 2039

The Workers' Compensation Advisory Council recommended these changes to the Minnesota Workers' Compensation Act:

1. An increase in the maximum compensation rate, effective October 1, 2007, to \$850.00 per week (versus the \$750.00 maximum rate today).
2. Increasing the number of weeks of temporary total disability payable under any new injury date, to 130 weeks (26 weeks added on to the current 104 week limitation).
3. Requests for retraining would need to be filed with the Commissioner before 208 weeks of any combination of TTD or TPD benefits has been paid (formerly 156 weeks). Similarly, the employer and insurer must notify the employee, in writing, of the 208 week limitation, prior to 80 weeks of TTD and/or TPD benefits being paid.
4. Multiple changes with regard to the "relative value" fee schedule for payment of medical expenses and significant changes as to payments to the 11-county Metro Area hospitals.
5. Creation of an employee identification number versus the employee's social security number in an effort to prevent identification theft.

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HDBOB Annual Mid-Winter Seminar Review

HDBOB's mid-winter seminar was again a great success. The two-day seminar focused on both Minnesota workers' compensation issues and liability claims in Minnesota and Wisconsin. Taking a fresh approach to workers' compensation independent medical examinations, partner Jamie Schaps graciously volunteered to be examined by orthopedic surgeon, Thomas Walsh M.D. Other topics ranged from "How to Succeed in Mediation," presented by partner J. Mark Catron who acts as a full-time mediator and arbitrator in a variety of civil matters to minimization of Roraff fees by associate Jason Schmickle who has successfully mitigated such awards to petitioner's attorneys in worker's compensation cases.

As in past years, HDBOB has applied to the Minnesota Board of Continuing Legal Education for approval of seminar credits. For those of you who were unable to attend the mid-winter seminar, materials are still available. To get your HDBOB mid-winter seminar materials, please contact Caryl Ghimenti at cghimenti@hdbob.com.

Thank you to those of you who attended this year's seminar. We hope to see you all again next year!

NEUTRAL PHYSICIAN MANDATORY CONTINUED FROM PAGE 1

Minn. Stat. § 176.155, subd. 2. The employee objected to designation of a neutral physician, asserting that "[i]n view of the upcoming hearing, it would be untimely to try to secure this opinion." The compensation judge denied the School District's motion. The judge provided three grounds for his decision to deny their request including: (1) the motion was deficient in necessary information in order to trigger the mandatory designation of a neutral physician; (2) the mandatory provision did not apply because there had been no pre hearing conference; and (3) the issues presented did not warrant a neutral examiner.

Ultimately, the compensation judge found that the employee sustained Gillette-type injuries to the cervical and thoracic spine, and awarded compensation for a 12.5% permanent partial disability. The employer appealed the compensation judge's findings. On appeal, the WCCA affirmed the compensation judge's denial of the School District's request for a neutral physician examination.

On appeal from the WCCA, the Minnesota Supreme Court examined Minn. Stat. § 176.155, subd. 2, which provides, in pertinent part, that the compensation judge "may with or without the request of an interested party, designate a neutral physician to make an examination of the injured worker and report the findings." The subdivision continues that "when an interested party requests, not later than thirty (30) days prior to a scheduled pre hearing conference, that a mutual physician be designated, the compensation judge shall make such a designation." Minn. Stat. § 176.155, subd. 2.

The Court found that the statute can be read to give effect to both the first and the second provision regarding the designation of neutral physicians, and

thus there was no conflict between the two provisions. The Court stated that the first provision gives the compensation judge the discretion to appoint a neutral physician when he or she believes it is necessary, even if there has not been a request by the parties. Additionally, the Court stated that the provision also gives the compensation judge discretion to appoint a neutral physician when a party has made a request but the request is not timely because the request is made less than thirty (30) days before the pre hearing conference. Conversely, the second provision removes this discretion when a party has made a request and the request falls within the time deadline provided, not later than thirty (30) days before a scheduled pre hearing conference. As such, the Court found that the two provisions are thus complimentary and not inconsistent.

Thus, the Court held that the neutral physician examination provision, Minn. Stat. § 176.155, subd. 2, is mandatory when an interested party makes a timely request for a neutral physician. In this case, because the employer made its request for neutral physician within the time deadline specified in the statute, the compensation judge had no discretion under the plain language of the statute to deny the request.

Although the designation of a neutral physician could assist in resolving medical disputes in workers' compensation claims, we should keep in mind that the defense will likely bear the cost of such a designation.



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COMMUNITY INVOLVEMENT

HDBOB Attorneys Race for Justice

HDBOB once again made a formidable showing on April 15, 2007 at the fifth annual Race for Justice. The event's proceeds partially fund the Loan Repayment Assistant Program of Minnesota which helps meet the legal needs of low-income Minnesotans by subsidizing the education debt of dedicated public-interest attorneys.

Although not setting any land-speed records, HDBOB's eleven entrants all finished the event without any (serious) injuries.

HDBOB has been one of the event's sponsors for the last three years.



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HDBOB Attorneys Give Back to Local Schools



For the past three years, HDBOB associate Stacey Sorensen has coached the St. Paul Central High School mock trial team. This season, HDBOB sponsored the team's attendance at a mock trial skills camp at Hamline University in St. Paul. Attendance at this skills camp, along with hard work and dedicated coaching, helped the team skyrocket its way to the state competition. After five straight wins, the St. Paul Central team became the regional champion. The team then went on to place 8th at the state competition held in Rochester, Minnesota in March.

HDBOB associate Patrick Ostergren also dedicates his time to local high schools, speaking to students about careers in the law and the American judicial system through the Hennepin County Bar Association. In addition to his speaking engagements, Pat helped prepare the Edina Middle School mock trial team for this year's Minnesota state mock trial competition.

Thank you to both Stacey and Pat for their dedication to the local community!

Minnesota Supreme Court Limits Penalties for Failure to Notify Employer of Third-Party Settlement

In *Adams v. DSR Sales, Inc.*, 727 N.W.2d 139 (Minn. 2007), the Minnesota Supreme Court ruled that an injured employee who failed to notify his employer that he was settling his tort suit against a third-party tortfeasor should not be made to forfeit his statutory right to retain a third of the net proceeds of that settlement.

Minn. Stat. § 176.061, subd. 6, provides a statutory formula for allocating the proceeds of the third-party action when an employer has paid workers' compensation benefits. The employee is allowed to retain a third of the net recovery, with the balance being used to reimburse the employer for past and future benefits paid.

In order to protect the employer's subrogation interest, an employee who institutes an action against a third-party tortfeasor cannot enter into a settlement agreement that affects the employer's interest without the employer's knowledge and consent.

In *Adams*, the employee had been injured when the motorcycle he was riding was involved in a collision with another vehicle. The employee received \$20,550.00 in wage loss benefits from his employer. The employee later settled his third-party action against the third-party driver without notifying his employer of the settlement. The net proceeds of the settlement were \$62,667.00.

As a sanction for not informing the employer of the settlement, the Workers' Compensation Court found that the employee had forfeited his statutory one-third of the recovery, leaving the entire amount of the settlement proceeds available to the employer as a credit for workers' compensation benefits. The Workers' Compensation Court of Appeals affirmed, citing as authority its prior decision in *Womack v. Fikes of Minnesota*, 61 W.C.D. 574 (W.C.C.A. 2001).

The Minnesota Supreme Court rejected the *Womack* rationale, finding that there was no statutory authority to sanction an employee for failing to notify an employer of a settlement by depriving the employee of his or her statutory right to one-third of the settlement proceeds. Rather, the Minnesota Supreme Court found that any attempt to release the subrogation rights of an unnotified and unconsenting employer in the settlement agreement would be void.

In light of the *Womack* decision, it is always a good idea to closely follow the progress of third-party liability claims in which you have a subrogation interest as apparently notification of settlement need not be given.

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Spoilation of Evidence Results in Increasingly Harsh Sanctions

In a recent string of spoliation cases Minnesota courts have been increasingly penalizing parties who dispose of property before it can be fully analyzed and inspected. Most savvy attorneys and insurance adjusters realize the need to provide notice to potential defendants in cases where property may need to be inspected in order to determine liability. However, in *Hughs, Graham v. Black & Decker, Inc.*, No. 05cv01536 (D. Minn. January 25, 2007), the insurance company disposed of a toaster oven that had been manufactured by Black & Decker, which State Farm's expert believed, was ultimately the cause of the house fire well before giving Black & Decker notice or a chance to inspect the oven.

In *Hughs*, Judge Patrick Schiltz of the United States District Court for the District of Minnesota, sanctioned the insurer for spoliation of evidence. He provided the jury with an instruction that it could draw a negative inference from the fact that the insurer allowed the fire scene to be destroyed before Black & Decker had a chance to examine its toaster oven.

Granted, it is not always possible to fully preserve an accident scene—particularly a fire scene. However, insurers need to balance the concerns and eagerness of the insureds for the repair of their property with the potential for spoliation sanctions. It is not always readily apparent what the exact cause of a fire or other damages may be. Additionally, it is often unclear who all the parties will be to the lawsuit. Thus, it is important to preserve evidence that is likely to be useful at trial as sanctions, including dismissal, have become more commonplace.



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Don't Sneeze and Drive!!

Minnesota drivers who cause a motor vehicle accident have long been granted a pass in emergency situations where, due to particularly harrowing circumstances, a collision was otherwise unavoidable. A creative (and apparently negligent) driver, however, recently put this exception to the test.

For years Minnesota juries have been instructed that "one suddenly confronted by a peril, through no fault of his own, who, in the attempt to escape does not choose the best or safest way, should not be held negligent because of such choice unless it was so hazardous that the ordinarily prudent person would not have made it under similar conditions." *Johnson v. Townsend*, 195 Minn. 107, 110, 261 N.W. 859, 861.

In *Barnes v. Dees*, 2007 WL 3541, No. A06-240 (Minn. Ct. App. January 2, 2007), the Court of Appeals was asked to extend the emergency rule to a driver with allergies and a cold who, as a result of a terrible sneezing fit, ran a red light and collided with another vehicle. While humoring the stuffy and red-eyed defendant, the Court determined that the jury need not be instructed that "sneezing constituted a sudden peril that deprived [the defendant] of the opportunity to decelerate or brake."

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WORKERS' COMPENSATION CONTINUED FROM PAGE 1

INJURIES CAUSED BY MENTAL STRESS HOUSE FILE NUMBER 2047

The definition of a "personal injury" would be expanded to include the following definition:

Personal injury includes a mental injury, with or without an attendant physical injury, caused by mental stress arising out of and in the course of employment, **if the stress was beyond the ordinary day-to-day stresses to which all employees are exposed.**

This is an expansion that has been tried in the past and has been given new life by the legislature. This expansion substantially changes the current law, which requires an attendant physical injury to any mental stress claim. Pure mental stress injuries are not presently compensable in Minnesota.

CONTINUED HEALTH COVERAGE FOR INJURED WORKERS ATTORNEYS FEES IN MEDICAL/ REHABILITATION DISPUTE SENATE FILE NUMBER 1339

Senate File Number 1339 is a very interesting and controversial proposal. Minn. Stat. § 176.021, subd. 7 would be expanded to require employers and insurers, in addition to paying temporary total disability, temporary partial disability or other indemnity, to pay for medical insurance premiums. The specific new proposed language reads:

In addition, every employer is liable to continue paying the total cost of an employee's medical insurance premium in the case of personal injury or death arising out of and in the course of employment without regard to the question of negligence, if the employee was receiving medical insurance coverage at the time of injury or death

This particular bill substantially changes payment of hourly attorney's fees claimed after a medical or rehabilitation dispute arises. The language of Minn. Stat. § 176.081, subd. 1 currently requires an attorney to establish that a contingent fee is "inadequate to reasonably compensate an attorney for representing the employee in the medical or

rehabilitation dispute." Typically, an affidavit would be required along with fee billing statements showing that the amount of time required to represent the employee in a medical or rehabilitation dispute was significantly greater than any contingency fee could compensate.

Under the proposed change, all of that "inadequacy" language is eliminated. All an attorney would need to do, following representation of an employee in a medical or rehabilitation dispute, is to file their affidavit/petition for Roraff or Heaton fees. The amendment to the statute simply indicates that the employee is entitled to receive the amount they petitioned for, "[i]f the employee's claim prevails." Certainly, this change would dramatically increase the amount of attorney fees claims pursued by employee's counsel and create a much greater incentive on the part of employee's counsel to represent their clients in small medical or rehabilitation disputes.

"ADVERSE MEDICAL EXAMINATIONS" SENATE FILE NUMBER 691

This legislation has been proposed many times in the past, but now has new provisions affecting the *use* of independent medical examinations. This bill also affects medical examinations under the No-Fault Act contained in Minn. Stat. § 65B.56, subd. 1.

The first proposed change is to the term "physical examination." This bill proposes to change this term to read "adverse medical examination." The terminology change is one that has been proposed in the past by the plaintiff/employee's counsel lobby to place negative overtones on what has always been referred to as independent medical examinations.

Second, the employee would only be required to attend an examination if all of his bills were timely paid and paid in accordance with appropriate fee schedules. "Timely" is defined to mean within thirty (30) days of the treatment date.

Third, physicians performing independent medical examinations would be restricted to performing no more than twenty-four (24) independent

medical examinations each calendar year, whether done for one or more insurance carriers or employers. This bill likely violative of constitutional provisions within the commerce clause because it places restrictions on free trade. As such, it is unlikely to pass during any legislative session.

Lastly, a doctor could still perform a paper review, but such review could not be used to deny benefits. Moreover, a physician conducting a paper review would be unable to testify unless they actually physically examined the plaintiff/employee.

REGULATING CHANGES IN THE MINNESOTA NO-FAULT ACT SENATE FILE NUMBER 1309,

The changes proposed in the No-Fault Act are the first real changes increasing the benefit structure in many years. Since the No-Fault Act was created in 1975, there has virtually been no change to the benefit structure.

Under the proposed bill, disability and income loss benefits would be increased to a maximum of \$500.00 per week (versus the current \$250.00 per week maximum). Funeral expenses would be increased to \$5,000.00 (versus the current \$2,000.00). Replacement service and loss expense benefits would be increased to \$600.00 per week maximum (versus the current \$200.00 maximum).

Under the proposed legislation, if an automobile policyholder has two or more insurance policies, the no-fault liability limits for basic economic loss benefits would automatically be added or "stacked" together to determine the limit of insurance coverage. In other words, most two vehicle households would have a maximum of \$1,000.00 per week for wage loss benefits, etc. Insurers would be required to notify all policyholders that they can elect not to stack their benefits as they would be automatically stacked under the new law.

Under the medical benefit payments, small but rather significant language is added to increase the liability for payment of non-traditional forms of medicines. Under Minn. Stat. § 65B.44, subd. 2, the first subcategory of medical,

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WORKERS' COMPENSATION CONTINUED FROM PAGE 3

surgical, x-ray, optical, dental, chiropractic, expenses would also include other "items that provide relief from any injury." This is rather broad language and seems to significantly expand the obligations of the automobile insurer to cover just about any type of treatment their policyholder sought as long as the policyholder were to testify such treatment "provided relief." The total cost of such treatment does not appear to be an issue under the proposal.

BENEFIT TERMINATIONS OR DENIALS SENATE FILE NUMBER 119

Under this new provision, Minn. Stat. § 65B.565 would be created and would state as follows:

No reparation obligor shall terminate basic economic loss benefits or deny a claim by an insurer for basic economic loss benefits unless this action is taken based on an Award obtained in an arbitration proceeding pursuant to § 65B.525

This paragraph appears to eliminate any process by which an insurer could send the claimant to an independent medical examination, receive a decision supporting denial of the claim and then notify the claimant in writing. That entire procedure would be eliminated. Auto insurers would be required to continue

paying benefits until such time as an arbitration proceeding went forward and, then, benefits could only be discontinued if a no-fault award allowed denial of the claim.

This begs the question of how is it that an arbitration proceeding would ever occur if insurers are required to pay all bills up to the point of arbitration? In other words, there would never be an outstanding and unpaid bill, which would be the subject of an arbitration, if insurers would be required to pay everything up the point of arbitration. Obviously, a "credit" system would result with the automobile insurer taking a credit in the future for disallowed claims.

DIRECT ACTION IN BAD FAITH CLAIMS SENATE FILE NUMBER 1152

This bill creates liability directly for an insurer in the case of its insured's negligence and resulting damages. Of course, the major difference created by this bill is the ability of plaintiff's attorneys to name the insurer as a defendant in a typical Summons and Complaint. As many of you know, this is the procedure that has been used in Wisconsin for many years. This bill is extremely controversial and has been debated in at least two separate committees as of this date. The Minnesota Defense Lawyers Association

has taken a firm position against the newly proposed legislation. In addition to the changes referred to above, this bill also has so-called "bad faith" provisions. The legislation would require all insurers to act in good faith and will impose liability on an insurer for things such as delays or denials of benefits "without a reasonably objective basis." Similarly, fraud, false pretense, false promise, misrepresentation, misleading statements and/or deceptive practices relied upon by an insureds would constitute bad faith.

The legislation discussed above is currently under consideration by the Minnesota Legislative committees. We would not expect there to be wholesale changes made in either the workers' compensation or no-fault laws during this session. However, while these issues may not be decided in the current session, it is likely that the topics will arise in future sessions. As always, we are available to answer your questions as to any specific proposed new legislation.



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